INDEX

CITATIONS

703879—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 262

MAY DEPARTMENT STORES COMPANY, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (VIII, 2–18) [1] is reported at 154 F. 2d 533. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 149–171, 294–

[1] The printed record for purposes of the petition for certiorari consists of a volume entitled "Record", containing the complaint, decision of the Board, and other papers, which is referred to herein by the designation (R. —), and eight volumes numbered I through VIII, containing the transcript of testimony, exhibits, and record of proceedings in the court below, which are referred to herein by the roman numeral designating the appropriate volume, thus (I, —).

295)[2] are reported in 59 N. L. R. B. 976 and 61 N. L. R. B. 3.

JURISDICTION

The decree of the court below (VIII, 45–49) was entered on May 23, 1946. A petition for rehearing (VIII, 19–44), filed by the petitioner herein, was denied on May 20, 1946 (VIII, 45). The petition for a writ of certiorari was filed on July 2, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board properly found that the no-solicitation rule promulgated and enforced by petitioner in its department store constituted an unwarranted restriction on the organizational rights of its employees insofar as it prohibited them from soliciting membership for unions during their non-working time off the selling floors of petitioner's store.

2. Whether there is substantial evidence to support the findings of the Board that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act,

[2] The Board's Decision and Order adopted, with some modifications, the Intermediate Report of the Trial Examiner, which is found at R. 171–292 (R. 149).

and discriminated in regard to the hire and tenure of employment of eleven of its employees in violation of Section 8 (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 21–23.

STATEMENT

Upon the usual proceedings, the Board, on December 14, 1944, issued its findings of fact, conclusions of law, and order (R. 149–292).[3] The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[4]

In the spring of 1937, United Retail, Wholesale and Department Store Employees Union of America, affiliated with the Congress of Industrial Organizations, which filed the charges in this proceeding (hereinafter called the Union), and an affiliate of the American Federation of Labor initiated competing organizational campaigns among petitioner's employees (R. 176; I, 59–65). Petitioner thereupon distributed leaflets among its employees during business hours which plainly expressed petitioner's animosity toward the Union and its campaign (R. 176–177; I, 63–68, VII, 4771–

[3] On March 26, 1945, the Order was amended by the Board in a minor particular not relevant here (R. 294–295).

[4] In the following statement, the references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

4773). In August 1937, petitioner compelled employee Buddie to resign from the Union, utilizing a form of letter prepared by petitioner, as a condition of remaining in petitioner's employ (R. 178–180; IV, 2687–2694). Similarly, in October 1937, employees McCaffery and Bolfing were compelled by Superintendent of Employment McCarthy to sign prepared letters of resignation from the Union (R. 180–182; V, 3266–3274, 3279–3282).[5]

In August 1941, the Union renewed its organizational campaign, which had been abandoned in the latter part of 1937 (R. 185; V, 3305–3308). In September 1941, petitioner engaged a labor spy, McClelland, through a detective agency (R. 150, 185–186; I, 292–306, 401–402). McClelland was "planted" as an ordinary employee, and made daily written reports to petitioner through the detective agency concerning the Union sentiments and activities of his "fellow employees" (R. 150, 186–188; I, 304–347, 400–401, II, 1096–1097, 1153). On December 3, 1941, McClelland attended a meeting of the Union and reported the names of two employees who were present (R. 190; I, 399–400, V, 3353–3354); thereafter, these two employees

[5] Because the matters set forth in the foregoing paragraph were not specifically alleged in the complaint as constituting unfair labor practices, the Board did not find them to be such, but did find that "they are indicative of the [petitioner's] attitude prior to, and cast light upon its motives in connection with the activities alleged in the amended complaint" (R. 184).

were discharged (R. 190; III, 1755, V, 3354). The same detective agency also on occasion supplied petitioner with other labor spies (R. 150, 200–204; I, 485–490, 495–496, 505–511).

In April 1942, petitioner engaged in another form of surveillance by taking motion pictures of the distribution of handbills to petitioner's employees by Union organizers (R. 150, 198–199; I, 210–212, II, 1285–1290). Petitioner's employees were aware that their acceptance of handbills was thus being documented (R. 199; II, 1288, 1624); as a result of this and other restrictions brought about by petitioner, the Union's handbill distribution fell off by about one-third (R. 199; II, 1304–1305, V, 3316). In September and October 1942, petitioner varied its technique somewhat by taking still photographs of Union literature distribution and of other Union activities (R. 150, 199–200; II, 1332–1333, 1348–1349, 1352).

On August 21, 1942, the Union achieved some success by signing up practically the entire Toy Department as a group (R. 150, 207; V, 3318–3319). The next day, many of petitioner's high officials paid unprecedented visits to the Toy Department, conferring there in low tones and staring suspiciously at the employees (R. 150, 207; III, 1698–1703, 2092–2094, IV, 2740–2742, 2756–2758, 3045–3062, 3114, 3243). This behavior, coupled with remarks made to employees by petitioner's supervisors, aroused fears among the employees that petitioner was planning economic

reprisals against them for having joined the Union (R. 150–151, 163, 207–208; III, 1701–1702, 1708–1711, IV, 2741–2742, 3114, 3244–3245).

On October 8, 1942, 32 of the 35 salespeople in the Basement Shoe Department wore union buttons for the first time (R. 153, 245; IV, 3186–3187). The assistant executive head of the department scrutinized various employees, made written notations on a slip of paper in their presence, and asked one of them what the employee expected to gain from the Union (R. 153, 245; IV, 3185–3188). Following these incidents the supervisors in this department placed unprecedented restraints upon the employees' right to converse with one another in their free time (R. 153, fn. 12, 245; IV, 2694–2697, 2701–2702, 3189–3191, VI, 4554), and other supervisors made anti-union remarks to a button-wearer (R. 153, 261–264; III, 1981–1983, 1987–1988).

In September 1942, petitioner told employee Stolte that it had been considering giving her and other cleaning women a wage increase, but that it had changed its mind, and that the employees "had the Union to thank for that" (R. 152, 204, 206–207; IV, 3128–3135, 3137, V, 3334–3337, VI, 4515, VII, 4773–4780). In February 1943, petitioner induced employee Robertson to resign from the Union by expressly making his wage increase conditional upon his taking that action (R. 152, 224; IV, 2799–2807, VII, 4823, 4825).

In October 1942, petitioner defamed the Union by imputing to it responsibility for alleged acts of vandalism which it had no reasonable basis for believing were in any way caused by the Union (R. 152, 238–244; I, 264, 268–269, 288, II, 1166, 1167, 1175–1188, V, 3345–3346, VI, 4330, 4577, 4585–4589, 4591). From March to October 1942, petitioner repeatedly made statements to its employees, both individually and as a body, that it was unnecessary for them to join a union in order to hold a job with petitioner, without coupling with this statement any assurance that they could retain their jobs if they did join a union (R. 151; I, 102–106, 111–113, 117–118, 199–200, VII, 4787–4789). In October petitioner also informed its employees in substance that it would be futile for them to seek through collective bargaining any increases in wages or other changes in vital working conditions (R. 151–152, 232–237; I, 94–96, 259–262, V, 3434–3436, 3438–3439, VI, 4664–4665, Bd. Exhs. 16, 26, 51, 201, 234, 235). About the same time petitioner questioned an employee concerning her union affiliations and told her it would be useless to join the Union because "wages are frozen" (R. 152, fn. 8, 153, 244, fn. 111; IV, 2786–2789).

The Board found that petitioner's use of labor spies, its surveillance of Union activities through motion pictures and still photographs, its conditioning of a wage increase upon resignation from

703879—46——2

the Union, and the other acts and statements summarized above "were integral parts of a course of conduct which was designed to defeat the Union's organizational efforts and which interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," in violation of Section 8 (1) of the Act (R. 150).

In the fall of 1941, shortly after the Union renewed its organizational efforts among petitioner's employees, petitioner began to "reemphasize" a rule prohibiting employees from soliciting membership for any organization on company premises, whether on working or nonworking time (R. 149, 277–278; I, 257–258). It made repeated announcements of the rule in various ways coupled with the warning that violators of the rule had been and would be discharged (R. 149, 188–190, 204–205, 209, 216, 222–224, 231–232, 277–278; I, 105–106, 113–115, 117–119, 140–142, 145–147, V, 3432–3434, Bd. Exhs. 17, 21, 25, 28, 29).

The Trial Examiner found the no-solicitation rule to be wholly invalid insofar as it applied to non-working time (R. 280–282). The Board, reversing the Trial Examiner in part, held as follows (R. 154–155):

> We have in many prior decisions made clear our position that working time is for work, and that the Act does not prevent an employer from promulgating and en-

forcing reasonable rules governing the conduct of employees during working hours. We have made it equally clear, however, that, in the absence of special circumstances, a prohibition against union solicitation on the employer's premises outside of working time, such as "before and after work and during the luncheon and rest periods," does not bear reasonable relation to the efficient operation of the employer's business, and therefore constitutes an unwarranted interference with the employees' rights under the Act. The [petitioner] urges that, while the foregoing principles may be sound as applied to industrial plants, they should not be invoked in cases involving retail department stores because of the unique manner in which the latter type of enterprise conducts its operations. We perceive no reasonable basis for distinguishing between the two types of enterprises so far as concerns a general prohibition against union solicitation by employees during nonworking hours at all places on the [petitioner's] premises. The [petitioner] has adduced no convincing evidence that such a blanket injunction bears reasonable relation to the efficient operation of its business. However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the solicitation, if carried on on the selling floor, where customers are

> normally present, might conceivably be disruptive of the [petitioner's] business. We therefore find that the [petitioner's] rule is invalid, and violative of the Act, only insofar as it prohibits union solicitation off the selling floor during nonworking hours (such as luncheon and rest periods).*

The Board found that apart from the unlawful scope of the no-solicitation rule, petitioner enforced it discriminatorily against adherents of the Union (R. 153–154). Thus, while imposing the penalty of discharge on adherents of the Union for violations or claimed violations thereof (*infra,* pp. 11–12), petitioner permitted an employee who was a paid organizer for the rival (A. F. of L.) union openly to solicit membership for that organization on company time and property (R. 153–154, 278; IV, 2929–2936). Even when the attention of petitioner was specifically called to this open solicitation on behalf of the A. F. of L., petitioner took no action to discipline the employee or stop her activities (R. 154, 278; I, 99–100, 110–111, IV, 2959–2960, 2965, 2967, 2968, VI, 4329, VII, 4829).

The Board found that petitioner's disparate treatment of the Union and the A. F. of L. in enforcing the no-solicitation rule constituted discrimination against the Union in further violation of Section 8 (1) of the Act (R. 153–154).

* The Board's footnotes have been omitted from the foregoing quotation.

Between September 18 and November 6, 1942, petitioner discharged or laid off seven employees who belonged to the Union, allegedly for violating the no-solicitation rule. The Board found that since, as above indicated, the rule was discriminatorily enforced against adherents of the Union, it followed as a matter of law that the discharges and lay-offs were discriminatory and violative of Section 8 (3) of the Act (R. 156). Apart from this distinct and sufficient basis for its conclusion, the Board also found that of these employees, two (Brown and Moore) had not actually violated the rule as petitioner itself interpreted it (R. 157–158; I, 684–685, 689–692, 802–805, 881–887, 891, II, 938–945, 954, 966–968, 972, III, 2067–2073, 2077–2079, 2082–2085, 2089–2091, 2098–2099, 2103–2107, VI, 4211, 4213–4214, 4217, 4699–4703, VII, 4860); with respect to two others (Schneider and Athanas) petitioner had previous to their discharge plainly exhibited its hostility towards them because of their membership in the Union (R. 158–159, 190–192, 209–214, 261–266; III, 1977–1983, 1986–1988, 1993–1994, 1999); with respect to the remaining three employees, all were known to petitioner to have been active on behalf of the Union (R. 156–157; I, 833, III, 1749–1753, 1764–1765, 1850–1853, 1869–1883, 1885–1886, 1892–1894, 1936–1938, 1939–1941, 1951–1952, IV, 2662–2663); as to all seven employees, petitioner's decision to discharge or lay off the employee was made on the

basis of a third person's version of what had occurred, and petitioner, contrary to its professed practice, made no effort to obtain the accused employee's version before making the decision to discharge or suspend him (R. 157; record references *supra* as to *Brown, Moore,* and *Schneider,* and as to *Athanas* see I, 794–798, III, 1772–1773, *Rosciglione,* II, 895–903, III, 1945–1946, *Taff,* II, 919, 921–927, IV, 2667–2669, *Stewart,* I, 811–812, 814–817, 823–827, 833–836, III, 1846–1850, 1862–1864).

Employees Case and Jennewein were employed by petitioner for a substantial period prior to October 10, 1942, as "regular selling extras," each receiving about four days' work per week during that period (R. 159; II, 993–997, III, 2192–2194, IV, 2618–2621). After October 10, when both wore union buttons to work for the first time (R. 159; III, 2194–2198, IV, 2621–2623, 2625–2628), neither was given any work by petitioner (R. 159; III, 2198, IV, 2629–2631). The Board considered and rejected various conflicting explanations put forward by petitioner for its refusal to give these two employees further employment (R. 159–160; II, 991–993, 1012–1013, 1016–1017, 1018–1019, III, 2200–2202, IV, 2631). The Board concluded on the basis of the circumstances shown by the record that Case and Jennewein were refused employment after October 10 because of their membership in and open support of the Union (R. 159–160; II, 1000–1003, Bd. Exhs. 123, 124, 125,

II, 1015–1016, III, 2199–2200, 2200–2202, IV, 2624–2625, 2631, 2632–2635).

King was employed in petitioner's store as a demonstrator for various concerns promoting the sale of their products in the store (R. 250–251; IV, 2538–2540, Bd. Exh. 184). On October 5, 1942, she joined the Union and the next day wore a union button at work (R. 161, 251; IV, 2558–2559). A supervisor observed the button and commented on it to King (R. 161, 251; IV, 2559); four days later King received a dismissal notice from the concern whose scarves she was demonstrating (R. 161, 251; IV, 2559–2560). The same day, King was offered a position as demonstrator in petitioner's store by a turban concern, which offer was immediately withdrawn after petitioner interposed objections to King's employment (R. 161, 251; II, 1024, IV, 2545, 2561–2564). Subsequently King applied for and was refused employment by petitioner as a saleslady (R. 161, 252–253; IV, 2574–2575). The Board concluded on the basis of this and other cogent evidence (R. 161, 251–253) that petitioner discriminatorily caused the scarf concern to discharge King, discriminatorily induced the turban concern to deny her work, and itself discriminatorily refused to employ King as a saleslady (R. 160–161; II, 999–1003, IV, 2540–2542, 2564, 2572, 2603–2604, VI, 4639–4644). The Board also found that petitioner was an employer of King within the meaning of Section 2 (2) of the Act while she was

serving in its store as a demonstrator (R. 162–163; II, 1022–1031, 1034–1038, IV, 2550, 2572–2573, 2576–2578, 2579–2580).

Employee Marchand had been continuously employed by petitioner for 15 years and concededly was an excellent employee until her discharge on October 24, 1942 (R. 163, 164, 267; II, 932, III, 1695–1697, 1731–1732). She joined the Union, and became its secretary on October 7, 1942, a fact which petitioner admittedly learned (R. 163, 270; II, 932, III, 1698–1699, 1722). Petitioner's supervisors communicated to her their displeasure at her Union affiliation (R. 163, 268–269; III, 1708–1714). Beginning October 9, 1942, Marchand was absent from work due to illness, which she duly reported to her superiors on several occasions (R. 163, 164, 270; III, 1726–1731). On October 24, petitioner discharged her, falsely assigning as the reason that she had been absent "since Oct. 8, and has not reported" (R. 163, 267; III, 1731–1732). Marchand had been absent from work for a longer period before joining the Union without disciplinary action (R. 164, 271; III, 1734–1737); at the time she was discharged petitioner was suffering from an acute shortage of labor (R. 164; II, 932, 999–1000). The Board concluded from all the circumstances that petitioner's discharge of Marchand was discriminatory (R. 164; III, 1732–1737, 1737–1738, VII, 4801–4802).[7]

[7] The Board awarded back pay to Marchand only for the period November 12 to 17, 1942, finding that Marchand should

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 149–164, 289–290). Its order directed petitioner to cease and desist from its unfair labor practices; to offer reinstatement with back pay to the eleven employees discriminatorily discharged or laid off; to rescind immediately its rule against solicitation insofar as it prohibits union solicitation off the selling floor during non-working hours; and to post appropriate notices (R. 167–171).

On May 19, 1945, the Board filed in the court below a petition for enforcement of its order (R. 295–300). On April 11, 1946, the court handed down its opinion (VIII, 2–18), enforcing the Board's order with a minor, clarifying modification (VIII, 18). On April 26, 1946, petitioner filed a petition for rehearing (VIII, 19–44), which the court denied on May 20, 1946 (VIII, 45). On May 23, 1946, the court below entered its decree enforcing the Board's order with the minor modification mentioned (VIII, 45–49).

---

have reported to petitioner on November 17 in accordance with a letter petitioner sent her on November 14 (VII, 4802) offering to discuss her reemployment. It should be noted that an earlier statement of October 27 upon which petitioner places much reliance as refuting discrimination (Pet. 52–53) was made by a clerk apparently unfamiliar with Marchand's case and who did no more than suggest that Marchand come in to the office to discuss the matter (III, 1732–1733). Marchand's employment had then already been terminated by petitioner; indeed, even petitioner's final letter of November 14 speaks of Marchand's application for "reemployment" (VII, 4802).

703879—46——3

ARGUMENT

1. Petitioner's attack (Pet. 4–6, 10, 11, 13–25) upon the Board's determination that petitioner's no-solicitation rule was in part invalid is foreclosed by the controlling decisions of this Court in *Republic Aviation Corp.* v. *National Labor Relations Board,* and *National Labor Relations Board* v. *Le Tourneau Company of Georgia,* 324 U. S. 793. Petitioner's rule proscribed solicitation for a labor organization on the employees' own time anywhere in petitioner's establishment. The Board, confronted with the necessity of "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments" (the *Republic Aviation* and *Le Tourneau* cases, *supra,* at pp. 797–798), concluded that the rule was valid insofar as it forbade solicitation at all times on the selling floor, but was invalid insofar as it prohibited solicitation on non-working time off the selling floor (R. 155).

The *Republic Aviation* and *Le Tourneau* cases fully sustain the Board's action in the instant case. Here, as in those cases, the Board cited and relied upon the principles enunciated by it in *Matter of Peyton Packing Co.,* 49 N. L. R. B. 828, 843, and approved as proper by this Court (the *Republic Aviation* and *Le Tourneau* cases, *supra,* at pp. 803–804). In accordance with the

Peyton Packing case, the Board examined petitioner's contention that the operation of a department store presented "special circumstances" and sustained petitioner's contention to the extent that it found "special circumstances" to exist, i. e., it held petitioner's rule to be proper on the selling floor at all times because customers normally are present there and solicitation "might conceivably be disruptive of the [petitioner's] business" (R. 155). But as to places off the selling floor where customers are not normally present, the Board held the rule to be invalid with respect to non-working time since it perceived "no reasonable basis for distinguishing between" a department store and other plants in which employees desire to join unions and bargain collectively and use their free time to solicit other employees to join them (R. 155). The Board's determination was plainly reasonable, not arbitrary, and hence was properly sustained by the court below (VIII, 4–8).

Petitioner's repeated contention (Pet. 11, 13, 16, 19, 21, 22–24) that the validity of its no-solicitation rule is a matter of law to be decided by the court rather than by the Board is in the teeth of this Court's explicit statement in the *Republic Aviation* and *Le Tourneau* cases that the Act "left to the Board" the task of applying the Act's general prohibitions "in the light of the infinite combinations of events which might be charged as violative of its terms" (324 U. S.,

at p. 798). Similarly petitioner's claim of conflict (Pet. 6, 22, 24) with *Midland Steel Products Co.* v. *National Labor Relations Board,* 113 F. 2d 800, 805 (C. C. A. 6), disregards the conclusive fact that certiorari was expressly granted in the *Republic Aviation* case because it was in conflict with the *Midland Steel* case, among others (see 324 U. S. at p. 796, fn. 2), and that in affirming the *Republic Aviation* decision, this Court necessarily disapproved the *Midland Steel* decision.

2. Petitioner repeatedly charges (Pet. 5, 6–8, 10–12, 25–84) that the Board's findings are unsupported by substantial evidence. Curiously enough, however, in its petition and supporting brief aggregating some 84 pages, petitioner manages to discuss only two of the eleven discharges or layoffs found by the Board to be discriminatory and omits all discussion of the Board's numerous section 8 (1) findings [8] based upon petitioner's manifold and extreme violations of the Act. Thus petitioner makes no effort to demonstrate that substantial evidence is lacking to support the Board's findings that petitioner employed labor spies, engaged in surveillance of Union activities through motion pictures and still photographs, conditioned a wage increase upon resignation from the Union, and otherwise attacked the Union in the many ways summarized in the Statement (*supra,* pp: 3–8). Likewise, with respect to nine of the

[8] Other than the no-solicitation rule findings, *supra,* pp. 8–10, 15–17.

discharges or lay-offs, petitioner's bare allegations of error are not accompanied by "appropriate references to the record" (*Forness, Withy and Co.* v. *Yang-Tsze Insurance Association,* 242 U. S. 430, 434). Hence the question of substantial evidence is not adequately raised with respect to the foregoing unfair labor practices.

With respect to the two discharges (Stewart and Marchand) which petitioner discusses in elaborate detail as "examples" (Pet. 33–51, 51–54), the evidence summarized in the Statement (*supra,* pp. 11–12, 14–15) affords full support for the challenged findings. Especially is this so when as the court below indicates, the questions of "motive and discrimination" are viewed in the light of petitioner's "desire to thwart or nullify unionizing efforts" (VIII, 9). As this Court has pointed out (*Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 559–560):

> Motive is a persuasive interpreter of equivocal conduct, and the [petitioner is] not entitled to complain because [its] activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the [petitioner] on the questions of fact is that the evidence permits conflicting inferences, and this is not enough.

In any event, the adequacy of the evidence with respect to Stewart and Marchand presents no question of general importance. The cases cited by petitioner in which the circuit courts of ap-

peals have held Board orders not supported by substantial evidence turned, of course, on their facts and do not show a conflict.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

GERHARD P. VAN ARKEL,
General Counsel,
MORRIS P. GLUSHIEN,
Associate General Counsel,
ISADORE GREENBERG,
Attorney,
National Labor Relations Board.

JULY 1946.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment mem-

bership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the

court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1946